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ABSTRACT

School board members generally understand the ramifications of the open meeting and public records of their states; however, they may not know whether their use of e-mail is subject to these laws. Legally, e-mail has as much potential exposure to liability as any other communication subject to the state open-meeting law, or as any unprivileged communication ultimately classified as a public record. Accordingly, the legal issue of whether such correspondence must be made available to the public has been raised. School leaders must, therefore, consider the legal implications of using e-mail to conduct public business. The laws of a number of representative jurisdictions regarding this are given. Additionally, case notes are supplied for lawsuits regarding disabilities, religion, students rights, as well as reviews of Supreme Court decisions, and other matters before the Court. (DFR)

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INTRODUCTION

School board members generally understand the ramifications of the open meeting and public records laws of their states. However, the enthusiastic and well-intended board member may not have considered whether his or her use of electronic mail ("e-mail") is subject to these laws. The legal reality is that e-mail has as much potential exposure to liability for the district as any other communication subject to the state open meeting law, or as any unprivileged communication ultimately classified as a public record.

A superintendent of a large urban K-12 school district recently opened a Saturday morning board workshop on board-superintendent communication with the following hypotheticals:

Hypothetical No. 1: The superintendent and board members are all members of a list serve that has proven invaluable for keeping board members updated on the nuances of district business. Two of the five board members enthusiastically reply to the superintendent's e-mail communication concerning an upcoming expulsion hearing. Although the superintendent had not solicited a vote or a response, the two board members were only too happy to share their opinions. Because of the way a list serve works, all the other board members automatically received each of the replies. Has there been a violation of the state open meeting law?

Hypothetical No. 2: A member of the public, who also happens to be the disgruntled parent of the student recommended for expulsion at the next board meeting, requests under state public records laws copies of all board communications pertaining to pupil expulsions, *and* copies of all communications on items agendized for the upcoming board meeting. Is the parent entitled to receive copies of e-mail communications detailed in Hypothetical No. 1, above? Would these be available under a state public records act? Under FERPA?

With the escalating use of advanced technology within public school districts, school leaders must consider the legal implications of using e-mail to conduct public business. All 50 states have laws requiring that public entities open certain meetings to the public, and allowing the public access to documents and records unless a statutory exemption applies. The laws are typically interpreted broadly to ensure the public is involved in government decision-making. The increasing use of e-mail has raised the issue of whether such correspondence must be open to or made available to the public. For example, under open meetings laws, a question may arise as to whether a "meeting" has actually transpired when serial e-mail correspondence passed between school district board members, and whether they have unlawfully arrived at a consensus outside of a lawfully posted and convened meeting by utilizing e-mail. With respect to public records laws, the question arises as to whether disclosures of interoffice e-mail communications may be demanded by a member of the public in the same manner as a paper interoffice memo.

The law on these issue varies by jurisdiction, although common threads woven through the laws in most states provide helpful guidance for examining whether the use of e-mail impacts public disclosure statutes. Additionally, a review of the limited case law on the subject reveals that e-mail correspondence is often treated the same as other means of communication when interpreting public records and open meeting laws. Although the laws of a number of representative jurisdictions are considered below, it is by no means intended to be a comprehensive summary of laws in all 50 states. Each school district should look to the

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laws of its jurisdiction when determining whether e-mail correspondence between employees, between board members, or between employees and board members, is subject to public notice or disclosure requirements.

OPEN MEETINGS

Open meetings laws, commonly referred to as "sunshine" laws, typically require that meetings held to discuss public business be open to the public, absent a statutory exemption. The purpose behind sunshine laws is to allow the public to participate in, or have access to, matters of public interest. One author has described the benefits of conducting open meetings on matters of public interest as follows:

> [O]penness may inspire public officials to a higher quality of work. The public's watchful eye might promote a higher rate of attendance at meetings, improve planning of meetings, and encourage more thorough preparation and more complete discussion of issues by participating officials. Moreover, openness leads to better informed decision making because open meetings generate public input and criticism.
>
> The government also benefits from openness because better preparation and public input allow agency members to gauge public preferences accurately, and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs. The benefits of openness, therefore, inure to both the public affected by government decision making and the decision makers themselves.

Barrett, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 Tex. L. Rev. 1195, 1196-1197 (1998) (citations omitted).

Sunshine laws balance the public's right to be involved in government decision-making with the confidentiality rights of the governmental agency or its employees, students, or clients. While public involvement is encouraged and often required under sunshine laws, government employees are also afforded the opportunity, under particular circumstances, to meet behind closed doors to discuss confidential matters specified by state law.

California

In California, the Ralph M. Brown Act reads in relevant part: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." Cal. Gov't Code § 54953(a).

Relevant exceptions to this general provision include certain meetings with legal counsel about pending litigation, meetings with legal authorities on matters posing a security threat to public buildings, meetings on purely personnel matters, and specified meetings to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. Cal. Gov't Code §§ 54956.9, 54957.

A "meeting" is defined under Cal. Gov't Code § 54952.2 as including "any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains."

Although the open meeting law in California does not expressly address e-mail correspondence, it provides that legislative bodies of local agencies may use teleconferencing in connection with any meeting authorized by law. Cal. Gov't Code § 54953(b). It further requires that if teleconferencing is used to conduct a meeting that falls within Government Code section 54953, agendas must be posted at all teleconference locations, and the locations must be accessible to the public. *Id.* Because California's open meeting law places teleconferencing within the definition of "meeting," it is likely that other means of electronic communication, such as e-mail, would also be subject to California's sunshine law.

In *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal. App.3d 95, 214 Cal. Rptr. 561 (1985), the California Court of Appeal held that a series of nonpublic telephone conversations, each between a member of a local development agency and its attorney for the purpose of obtaining a commitment of a majority of that body on a matter of public business, constituted a meeting under the state's open meeting law. The court rejected the argument that the series of one-on-one telephone conversations did not constitute a "meeting" because they were conducted serially rather than simultaneously. The court said:

> Defendants argue that because the alleged telephone conversations were conducted serially as opposed to simultaneously as in the case of a "speaker phone" conference call among a majority of the members, the case falls within the statutory exception to the open meeting requirement where less-than-a-quorum of the governing body is at any one time involved. Section 54952.3 excludes from the "legislative bodies" to which the Brown Act applies, "a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." However, this exception contemplates that the part of the governing body constituting less than a quorum "shall report back to the parent body where there will *then* be an opportunity for public discussion of matters not already considered by the full board or a quorum thereof."

Id. at 102-103, 214 Cal. Rptr. at 565 (citations omitted, emphasis in original).

In the *Stockton Newspapers* case, the court held that, "such deliberation connotes not only collective discussion, but also the 'collective acquisition and exchange of facts' pertaining to the ultimate decision," and found the state's open meeting law to apply to collective investigation and consideration of the facts short of official action.

This holding makes it probable that serial e-mail transmissions related to public business that result in a majority of the legislative body exchanging information concerning their individual positions will fall within the purview of the open meeting laws, even though e-mail communication is typically not simultaneous in nature. A list serve that automatically routes a message to all members of a school board can be particularly ubiquitous if a board member intends to communicate his/her views on an issue only to the superintendent, but inadvertently copies all other board members as to how he intends to vote on an issue. *See generally* LEGAL ISSUES AND EDUCATION TECHNOLOGY, A SCHOOL LEADER'S GUIDE (National School Boards Association, 1999).

In the recent case of *Regents of University of California v. Superior Court*, 20 Cal.4th 509, 85 Cal. Rptr. 2d 257 (1999), the California Supreme Court addressed a matter involving the state's open meeting law. In a concurring opinion, Justice Brown commented that the underlying issue in the case, which was not addressed by the majority opinion, was whether "substantive discussions of official matters—whether conducted by telephone, letter, electronic mail, or face-to-face" among members of a state government body are required to be open to the public under the open meeting laws. *Id.* at 537, 85 Cal. Rptr. 2d at 274.

Justice Brown also questioned whether the court of appeal's broad definition of the term "meeting" in *Stockton Newspapers*, was intended by the legislature. Although Justice Brown directed much of her discussion to the deliberative process of the executive branch, and questioned whether prior case law defining "meeting" under the open meeting laws has rendered too broad an interpretation, the fact that e-mail transmissions have been identified as an issue by the California Supreme Court signals that additional case law on the issue is imminent.

Like many other states, California's open meeting laws prohibit the use of technological devices by a majority of the members of a legislative body to develop a collective concurrence on actions to be taken on an item of public business. CAL. GOV'T CODE § 54952.2(b). Accordingly, electronic mail may not be used by members of a local agency to circumvent the open meeting laws. California school districts should operate under the assumption that e-mail communication between a majority of the members of the school board is subject to the requirements of the open meeting laws to the same extent as other correspondence related to public business. Purely personal e-mail exchanged by board members that does not touch on matters under the board's jurisdiction is not subject to agenda and meeting requirements. E-mail transmissions between less than a majority of board members would likely not be considered a "meeting" requiring an agenda, nor a gathering open to the public.

Florida

Florida's sunshine law provides a right of access to state and local governmental meetings, and has been generally applied to any gathering of two or more members of the same board to discuss matters that will foreseeably come before the board for action in the future. FLA. STAT. ANN. § 286.011. The Florida Supreme Court has stated the law is to be construed "so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (1974). A provision allowing right of access to meetings of collegial public bodies is also contained in the Florida Constitution, and was approved by voters in 1992. FLA. CONST. art. I, § 24. Virtually all collegial public bodies are subject to the constitutional amendment, with the exception of the judiciary and the state legislature.

A Florida Attorney General opinion concluded that the Florida Sunshine Law authorizes *state* agencies to conduct meetings through electronic means, provided the board complies with uniform rules of procedure adopted by the state administration commission. Fla. Att'y Gen. Op. 98-28. The authorization to conduct meetings via electronic means applies only to state agencies. Therefore, because Florida law (FLA. STAT. ANN. § 230.17) requires that district school boards conduct their meetings at a "public place in the county," a quorum of the school board must be physically present at the meeting. The board may, however, use electronic technology to enable an absent board member to attend the meeting. *See* Florida Attorney General, GOVERNMENT-IN-THE-SUNSHINE MANUAL (1999).

With regard to computers and e-mail, the Attorney General concluded that the use of computers to conduct public business is subject to Florida's Sunshine Law. Fla. Att'y Gen. Op. 89-39. For instance, if a member of a school board e-mails to other board members a report informing them of issues to be discussed at an upcoming board meeting, the Florida Sunshine Law has not been violated. If, however, the board member e-mails the report to other board members and invites comments, and a number of board members proceed to exchange via e-mail opinions on matters they are scheduled to act on at the next board meeting, a violation of the Florida Sunshine Law has occurred. *See* Fla. Att'y Gen. Ops. 90-03, 96-35.

Missouri

Although the Missouri courts have not specifically addressed whether e-mail communications constitute "meetings" under the state's open meeting laws, case law defining "meeting" provides guidance on this issue. For example, in *Colombo v. Buford*, 935 S.W.2d 690 (Mo. Ct. App. 1996), a lawsuit filed against members of a school board alleged various violations of the state's sunshine law. The board members had engaged in one-on-one conversations, in person and over the telephone, regarding the renewal of the superintendent's contract and his overall performance. No poll was ever taken, however, on the issue of whether the superintendent's services should be retained. The court held that the series of one-on-one personal and telephonic conversations at issue did not constitute a closed meeting of a public government body that violated the open meeting law. With regard to the mandate in Missouri's Sunshine Law that a quorum of members of the public governmental body be present for there to be a "meeting," the court noted:

> Courts are not so naive as to be blind to the fact that those inclined to violate the Open Meeting Laws could do so by using the quorum requirement as a shield. This could be done by conducting, in effect, the equivalent of a "public meeting" in a series of "closed meetings" with numbers of less than a quorum in each such meeting, but totaling a quorum or more when taken together. In such closed meetings with less than a quorum,

> deliberations could be conducted and votes taken with a public meeting then being held to ratify publicly that which had already been done in private. This would violate the spirit of our Sunshine Law, and would render an unreasonable result that was not intended by our legislature.

Id. at 699, citing *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. 1991).

The *Colombo* decision indicates a series of telephone conversations may violate the Missouri Sunshine Law if a quorum of board members discuss a matter of public business that should be addressed in public. This is likely the case even if, for example, one board member leaves voicemail messages for a majority of the other board members on a matter of public interest, and those board members return his or her call at various times over the next few days. An analogy can easily be drawn between that scenario and one in which a school board member sends an e-mail message to other board members, and those board members respond by return e-mail at their leisure. It is therefore likely that e-mail transmissions are covered by Missouri's Sunshine Law, and would be considered "meetings" that merit public participation if a matter of public business is discussed among a quorum of the governmental body.

The *Colombo* decision also emphasizes that the quorum requirement should not be used to circumvent the purpose of the open meeting laws. A school board member should not be permitted to talk to other board members behind closed doors on a one-on-one basis if he or she would violate the open meeting law by discussing the same matter with a quorum of board members. The principles articulated in *Colombo* were reaffirmed by the Eighth Circuit Court of Appeals in *Hanten v. School Dist. of Riverview Gardens*, 183 F.3d 799 (8th Cir. 1999).

Nevada

The Supreme Court of Nevada directly addressed the issue of whether the use of serial electronic communications to deliberate matters of public interest violates Nevada's open meeting laws in *Del Papa v. Board of Regents of the University and Community College System of Nevada*, 956 P.2d 770 (1998). In *Del Papa*, Nancy Price, a member of the University Board of Regents made several public comments criticizing her fellow regents. The chairman of the board then asked the director of public education to draft a response. This media advisory was disseminated by facsimile to all board members, except Price, along with a memorandum requesting feedback. The board members responded to the draft advisory through telephone calls charged on the university's calling card. It was ultimately determined that the media advisory would not be released.

After receiving a complaint from Price, the state attorney general filed a lawsuit charging, among other things, a violation of the state's open meeting law because the regents determined whether to issue the media advisory after consulting by facsimile and telephone rather than by public meeting. The Nevada Supreme Court noted the term "meeting" as used in its open meeting law is defined as:"'[T]he gathering of members of a public body at which a quorum is present to deliberate toward a decision or to [take action] on any matter over which the public body has supervision, control, jurisdiction, or advisory power.'" *Id.* at 773, citing NEV. REV. STAT. § 241.015(2).

Further, Nevada law provides that "'electronic communication . . . must not be used to circumvent the spirit or letter of [NRS chapter 241] in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory powers.'" *Id.*, citing NEV. REV. STAT. § 241.030(4). After consideration of relevant case and statutory law, the Nevada Supreme Court concluded that "a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction, or advisory power violates the state's open meeting law." *Id.* at 778. The court noted, however, that in the absence of a quorum, members of a public body could privately discuss public issues or lobby for votes without running afoul of the state's open meeting law. If a quorum is present, or is "gathered by electronic communication," the body must abide by the public meeting requirements.

Although *Del Papa* involved a situation where deliberations of public interest were conducted via facsimile transmission, the court's repeated reference to "electronic communications" strongly implies its holding and reasoning apply to e-mail transmissions as well.

Utah

Utah law provides that meetings of public bodies must be open to the public unless a specific statutory exception applies. Utah Code § 52-4-2 defines "meeting" under this general rule as: "the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power." In addition, Utah Code § 52-4-7.8 specifically refers to "electronic meetings" and reads:

> (b) "electronic meeting" means a public meeting convened or conducted by means of a telephonic, telecommunications, or computer conference.
>
> (c) "electronic notice" means electronic mail or fax.
>
> ***
>
> (2) A public body may, by following the procedures and requirements of this section, convene and conduct an electronic meeting.

Public notice of the electronic meeting must be provided by either posting written notice at the "anchor" location of the meeting or providing written or electronic notice to at least one newspaper of general circulation and a local media correspondent.

Because Utah's open meeting laws specifically state a "meeting" may consist of a quorum of a public body, "whether in person or by means of electronic equipment," it may be argued that e-mail communications by public bodies are subject to the open meeting provisions.

Virginia

Virginia's Freedom of Information Act ("Act") provides:

> By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to records in the custody of public officials,

> and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public, and all public records shall be available for inspection and copying upon request.

VA. CODE ANN. § 2.1-340.1.

The Act goes on to state that the public records and open meetings provisions are to be liberally construed, while exceptions should be narrowly read. With regard to "electronic communication meetings," the Act reads:

> It shall be a violation of this chapter for any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government or any committee thereof to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

VA. CODE ANN. § 2.1-343.1.

Statutory law in Virginia therefore expressly prohibits the use of e-mail, telephonic, or video means to conduct meetings where the members of the public body are not physically present. Video cameras and telephones are permitted to provide expanded coverage of a meeting to the public. In addition, video and telephonic meetings may be held if a quorum of a public body is physically assembled at one location, and additional members participate in the meeting through telephonic means, provided that such participation is available to the public. No more than 25 percent of all meetings held annually may be conducted by telephonic or video means.

Factors to Consider When Using E-mail to Discuss Public Business

Most states construe their open meetings laws broadly, and the exceptions to those laws narrowly. An example of this is Kan. Att'y Gen. Op. No. 95-13, 1995 WL 40761, that found school board members in violation of the state sunshine law when a quorum of board members simultaneously engaged in board business through computer terminals. A subsequent opinion of the Kansas Attorney General found that a communication tree used to poll board members by e-mail would also violate Kansas law. School districts should examine the law in their jurisdiction to determine whether case or statutory law has been implemented that specifically addresses the use of e-mail, and whether e-mail communications may constitute "meetings" that trigger the open meeting requirement. An example of a law that limits the usually broad definition of a public record is Col. Rev. Stat. Ann. § 24-6-402. 2(d)(III)(West, 1998). This states that only e-mail used "to discuss pending legislation or other public business" is subject to the state's sunshine law, which also does not cover e-mail communications on other topics.

As in cases where a series of telephone calls made between members of a public body to conduct public business have been found to violate open meeting laws, a series of e-mail communications between members of a public body on a matter of public interest may violate a requirement that an agenda be posted. These may also transgress the open meeting laws, if the public is denied the opportunity to observe the meeting. Further, the content of the e-mail correspondence is critical in assessing whether the matter should be open to public participation. For instance, purely personal e-mail correspondence on a subject not under the board's subject matter jurisdiction would not invoke open meeting laws because it does not involve a matter of public business.

PUBLIC RECORDS

As with open meeting laws, all 50 states have enacted public records laws that allow the public access to matters of public concern. Whereas open meeting laws afford the public an opportunity to participate in meetings held to discuss or deliberate on public business, public records laws provide the public access to documents related to public business. The central issue that arises with the increasing use of e-mail within school districts is whether an e-mail exchange constitutes a public record that must be preserved, and made available to the public upon request. A writer for the Seattle Times offered the following perspective in a February 1999 editorial:

> [J]ournalists today are finding that some electronic communications between public officials are falling into information black holes.
>
> The biggest concern is electronic mail. An increasing number of public officials have personal computers, Internet hookups, and e-mail capabilities. With just a few clicks of a mouse, policy decisions can be made by members of city councils or school boards from the convenience and privacy of their homes without advanced planning or public notice . . . .
>
> With e-mail use spreading rapidly, the state Legislature should update public disclosure and open meeting laws to reflect technological innovations in the way government officials communicate with each other and the public. One goal should be uniform methods of recording and archiving e-mail messages sent on government computers.

Government Online: Keep it Open, Public, Editorial, Seattle Times (February 11, 1999).

As this issue intensifies with the increasing use of e-mail by public bodies, state courts and legislatures will likely address the matter, and clarify the law as it relates to electronic correspondence. Public records laws from representative states are examined below to provide an overview of the relationship between the use of electronic mail and public records laws.

California

California's Public Records Act provides:

> Public records are open to inspection at all times during the office hours of the state or local agency, and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

CAL. GOV'T CODE § 6253.

"Public records" under the above provision are defined as: "[A]ny writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics . . . ." CAL. GOV'T CODE § 6252(e).

In addition, a "writing" is defined as:

> [H]andwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic and punched cards, discs, drums, and other documents.

CAL. GOV'T CODE § 6252(f).

As with public records laws in all states, the California Public Records Act defines "writings" that are considered public records broadly, and e-mail correspondence is likely a "writing" subject to disclosure if it relates to a matter of public business, and is not specifically exempt under law. The numerous exemptions to the general provision requiring disclosure of public records include, but are not limited to: 1) preliminary drafts, notes, or memoranda not retained by the public agency in the ordinary course of business, provided the interest in withholding the records clearly outweighs the public's interest in disclosure; (2) records related to pending litigation; (3) personal, medical, or other files that would constitute an unwarranted invasion of personal privacy; and (4) test questions, scoring keys, and other examination data used to administer an academic examination. CAL. GOV'T CODE § 6254.

California school districts are governed by statutory provisions and regulations of the Department of Education that classify records made by public employees, and specify the requirements for the maintenance, storage, and destruction of such records. E-mail records pertaining to public business should be treated in accordance with these provisions for maintenance and destruction of records. These records may either be archived on a school database or printed and saved as hard copies. California law specifies that, "computer data shall be provided in a form determined by the agency." If a school district receives a request for an e-mail that falls within the statutory definition of a public record, it may produce a copy of the e-mail on floppy disk or by printing out the requested information. It may also e-mail the document to the requester.

Proposed legislation that would *require* a public agency that stores public records in an electronic format to make the information available upon request in electronic format has been vetoed in both the 1997-1998 and 1999-2000 legislative sessions. Assembly Bill 179 was vetoed by the California Governor in the 1997-1998 session because it would result in an excessive burden on government agencies. In addition, Senate Bill 1065 was vetoed in January 2000 because many of California's computer systems did not yet have the capacity to implement the bill's provisions. Based on the history of proposed legislation in this area, and the fact that the most recent legislation was vetoed on non-substantive grounds, it is likely additional legislation regarding electronic production of electronically-stored public records will be proposed again in the near future.

Florida

Florida law defines "public records" that are subject to public disclosure, unless a specific exemption applies, as:

> [A]ll documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

FLA. STAT. ANN. § 119.011(1).

The Florida Attorney General has opined that an e-mail transmission is a "public record." Fla. Att'y Gen. Op. 96-34. Florida law also provides: "Access to computerized public records is allowed through use of programs currently in use by the public official responsible for maintaining such records." FLA. STAT. ANN. § 119.07. Based on the foregoing, e-mail transmissions sent and/or received by school district employees pursuant to law or in connection with official business must be retained by the district and produced as a public record upon request.

In *Amendments to Rule of Judicial Administration 2.051*, 651 So.2d 1185 (1995), the Florida Supreme Court approved amendments to Florida's Rules of Judicial Administration. Although the rules of judicial administration do not apply to school districts, the court's discussion of the impact of electronic mail on the rules offers guidance for examining the relationship between e-mail correspondence and the state's public records laws. In describing the increasing use of e-mail in the judicial branch, the court stated:

> E-mail transmissions are quickly becoming a substitute for telephonic and printed communications, as well as a substitute for direct oral communications . . . . The fact that information made or received in connection with the official business of the judicial branch can be made or received electronically does not change the constitutional and rule-mandated obligation of judicial officials and employees to direct and channel such official business information so that it can be properly recorded as a public record. The obligation is the same whether the information is sent as a letter or memo by hard copy or as an e-mail transmission.

Id. at 1186-1187.

Similarly, because e-mail transmissions fall within the provisions of Florida's public records laws, those e-mails related to official business must be properly recorded and accessible to the public upon request.

Virginia

As previously noted, Virginia's Freedom of Information Act provides that if no exemption exists, "every meeting shall be open to the public and all public records shall be available for inspection and copying upon request." "Public records" are broadly defined under the Act as:

> [A]ll writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in possession of a public body or its officers, employees, or agents in the transaction of public business.

VA. CODE ANN. § 2.1-341.)

Because the above definition includes electronic recordings, regardless of their physical form or characteristics, as "public records," e-mail correspondence between school board members would fall within the purview of Virginia's Freedom of Information Act.

CONCLUSION

The legal impact of the use of e-mail on open meeting laws and public records laws varies from state to state. The increasing use of electronic technology will continue to raise legal issues, and prompt state legislatures to revise their laws. In many states, the effect of open meeting and public records laws on virtual conferencing, Internet chat rooms, and instant messaging systems has not been clearly addressed. An e-mail copied to all fellow board members or the use of interactive technology to exchange or communicate opinions on a subject within the board's jurisdiction while outside of the public meeting may trigger a violation of the state open meeting laws.

School districts should familiarize themselves with state laws concerning how records are classified, which records must be preserved, and when records may be destroyed. Local policies and procedures should be reviewed in light of available technology to retrieve documents, even when the recipient or sender of a message has deleted it.

Districts must be cognizant that every e-mail communication is potentially a disclosable public record. When in doubt about whether a proposed e-mail message would be classified as a public record available on request to any member of the public, board members and senior members of the administration should consult counsel prior to sending the message. School board members must be aware of the legal implications of electronic mail transmissions, and should be cautious about discussing matters under the subject matter jurisdiction of their board via e-mail, lest such communications be determined to be an illegal meeting. Many state laws require that any official business action taken in violation of a state's sunshine law be nullified. It is in the best interest of school districts to act preemptively in expanding awareness about the legal implications of corresponding on matters of public interest through electronic mail.

If an e-mail transmission is requested as a public record, school districts should first look to state law to determine whether the communication at issue is, in fact, a "public record." Because "public records" are broadly defined, and exemptions to the requirement that public records be disclosed are narrowly interpreted, local agencies should treat all e-mail correspondence that does not clearly fall within an exemption as though it may be subject to disclosure.

Case Notes

AMERICANS WITH DISABILITIES ACT

Superintendent's ordering teacher to undergo physical and psychological examinations was not sufficient to establish that school district regarded teacher as disabled within the meaning of the ADA becaus superintendent was aware of behavior on the teacher's part that would make a reasonable person question whether the teacher was still capable of performing his job.

Sullivan v. River Valley School District, 197 F.3d 804 (6th Cir. 1999)

http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=99a0395p.06

Tenured teacher with a clean disciplinary record began exhibiting disruptive and abusive behavior. During a school board meeting, the teacher shoved papers into the faces of school board members. He also disclosed confidential information regarding a student's grades, and criticized a fellow faculty member, using inappropriate language. He then failed to report to a meeting with the superintendent to discuss these incidents. The superintendent hired a psychologist to conduct an informal review of the teacher's behavior. After reviewing letters and grievances written by the teacher and letters from others reporting the teacher's behavior, the psychologist concluded that the teacher might have a psychiatric disorder and should undergo a formal psychological assessment. The school board approved the superintendent's recommendation that the teacher be required to undergo duty fitness physical and psychological examinations. When the teacher refused to take the exams, the superintendent suspended him and brought disciplinary charges. The school board voted to discharge the teacher based on the misconduct and insubordination reported by the superintendent. The state tenure commission granted the teacher's appeal, ruling that the teacher's conduct did not warrant discharge and instead imposed a three-year unpaid suspension. It also ordered the teacher to undergo physical and psychological examinations.

Addressing the teacher's ADA claim, the Sixth Circuit rejected the teacher's argument that the school board's ordering him to undergo the exams to determine his fitness to continue teaching was proof that it perceived him as impaired. The panel pointed out that the school district, as an employer, had a legitimate need to determine the teacher's fitness to continue teaching in light of recent aberrant behavior. Citing the Eighth Circuit decision in *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998), the panel held that an employer's request that an employee obtain a medical exam may signal the belief that the employee's job performance is suffering, "but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the

employee's major life activities." The panel turned aside the teacher's concern that its holding would allow employers to order unlimited medical testing of employees, observing that section 12112(d)(4)(B) of the ADA limits an employer's ability to require medical exams to those situations where there is a "genuine reason to doubt whether [an] employee can 'perform job-related functions'." Adopting the EEOC's regulation interpreting this section that "any examination ordered by the employer must be restricted to discovering whether the employee can continue to fulfill the essential functions of the job," it acknowledged that this did not provide an employer with an excuse to require an employee to undergo every wide-ranging medical exam to determine a mental or physical condition that could conceivably affect the quality of the employee's job performance. Having found that the teacher failed to establish the first element under the ADA, the panel also pointed out that he would have failed on both the second and third elements because: (1) he conceded that he had threatened board members which auton atically disqualified him from the job; and (2) the medical exams ere ordered for a valid reasons and therefore, they can not be an adverse job action. In addition, it noted that the teacher's subsequent suspension, while an adverse job action, was not discriminatory because it was based on the teacher's refusal to undergo valid medical examinations. Finally, in dicta the panel found that the teacher failed to establish that the school board's stated reasons for taking the adverse job action were a pretext for discriminating against him based on its perception of disability. It concluded that the teacher's argument regarding pretext was based on the misconception that he could succeed on his claim by showing that the school district officials were attempting to make it appear that he had a disability even though they did not actually believe he had one. The panel pointed out that the ADA only prohibits discrimination, not action taken using discrimination as pretext. The panel quickly disposed of the retaliation claim, finding the teacher had failed to point to any protected activity he was engaged in because the superintendent's ordering medical exams was not an adverse job action and the subsequent suspending of the teacher for refusing to comply with the order was not retaliatory.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Special education student who alleged he was physically and emotionally abused by school officials was not required to formally exhaust his administrative remedies under IDEA before filing suit against school district for monetary damages because: the student already informally used the administrative procedures to obtain the remedies available under IDEA; the monetary damages sought are retrospective in nature rather than based on the cost of future remedial services; and the damages based on past physical injuries can not be addressed by the remedies available under IDEA.

Witte v. Clark County School District, 197 F.3d 127 (9th Cir. 1999)

Special education student alleged that teacher and other staff members subjected him to physical, verbal and emotional abuse. The abuse included force feedings, forcible restraint, screaming at the child, and threats of being taken from his mother if he told anyone about the abuse. The abuse and punishment was inflicted on the student was for behavior that is characteristic of his disabilities, which included Tourette's Syndrome and other physical and emotional problems. After modifying the student's IEP in agreement with the student's mother, the school district placed the student in another school within the district where he was not subjected to any abuse. Shortly after his transfer, the student filed suit against the school district, seeking compensatory and punitive damages under section 1983, IDEA, and state tort law. The district court dismissed the suit on the grounds that the student had failed to exhaust his administrative remedies under IDEA.

A Ninth Circuit panel reversed, holding that the student was not required to formally exhaust his administrative remedies under IDEA before seeking monetary damages for past physical injuries. After reviewing the language of IDEA, the panel concluded that because monetary damages are not available under IDEA, the exhaustion of remedies requirement was not applicable. It rejected the school district's argument based on the holding in *Charlie F. v. Board of Education*, 98 F.3d 989 (7th Cir. 1996), that although the student was seeking monetary damages, he was still required to exhaust his administrative remedies under IDEA. The panel cited three grounds on which the present case was distinguishable from *Charlie F.*: (1) unlike the present case where the student had been able to resolve his educational issues through an informal agreement, in *Charlie F.* there was no evidence of any agreement between the parties either through formal or informal procedures to provide a new placement and future educational plans; (2) unlike the plaintiff in *Charlie F.* the student in the present case is not seeking damages for future remedial services, but rather his damages claim is solely retrospective; and (3) the injuries in *Charlie F.* centered on verbal and emotional abuse as opposed to the physical abuse in the present case. Noting that physical injuries are normally remedied through the award of monetary damages and that such damages are not available under IDEA, the panel found IDEA would not be the proper vehicle for addressing physical injuries inflicted on a special education student by school personnel.

Parents of suspended special education student who succeeded in obtaining an emergency stay-put placement order in an administrative hearing are not a prevailing party entitled to attorneys' fees under the IDEA because they did not obtain a judgment, consent decree, or settlement that materially altered the legal relationship between the parties in a way that directly benefited them.

Board of Education of Oak Park v. Nathan R., 199 F.3d 377 (7th Cir. 2000)

http://www.ca7.uscourts.gov/scripts/foxweb.exe/.../Op3?submit1=showop&caseno=97-334

Special education student was expelled for possession of marijuana after school officials determined that his misconduct was unrelated to his disability. Rejecting the parents' contention that the student's misconduct was related to his disability, the school upheld the expulsion. The school offered the student alternative non-special education services during the expulsion period. The parents then sought an emergency stay-put placement order from a level I state hearing officer. The officer ordered the student returned to school pending the outcome of the administrative hearing. The officer found that the student's disability was unrelated to the misconduct and, therefore, he was properly expelled. However, the officer ordered the school to continue

providing the student with special education services during the expulsion period. A level II hearing officer affirmed the level I officer's decision, but ordered the school to provide the student with compensatory special education services for the period of time between when he was originally expelled and the stay-put order went into effect. The school requested that the district court review the hearing officer's decision requiring it to provide special education services to the student during his expulsion. The parents counterclaimed for attorneys' fees. The district court granted the school's motion for summary judgment, holding the school was not required to provided services to a special education student who was expelled for conduct unrelated to his disability. The court also denied the parents' claim for attorneys' fees on the grounds they were not a prevailing party within the meaning of IDEA. The student never served his one semester expulsion as he was a senior and the district court's opinion was not rendered until he had graduated. The parents appealed the district court's decision denying services to the student during the period of his expulsion and the court's denial of their claim for attorneys' fees.

A Seventh Circuit panel held that the issue of whether the school was required to provide services to the student during his expulsion was moot because the student had graduated. It vacated and remanded to district court on this issue. However, it found that the mootness of the issue did not affect the validity of the claim for attorneys' fees because the claim was based on a decision made in an administrative hearing regarding the request for a stay-put order. On the issue of attorneys' fees the panel affirmed the district court. Its analysis began with an inquiry into whether the parents were the prevailing party within the meaning of § 1415(e)(4)(B) of IDEA. Based on its review of the case law, the panel stated a party could be considered prevailing when it obtains a judgment, consent decree, or settlement that materially alters the legal relationship between parties in a way that directly benefited the party. In regard to the parents' claim, the panel held that the obtaining of an emergency stay-put order did not make the parents a prevailing party because the order did not alter the parties relationships bur rather maintained the status quo until the hearing officer rendered his decision on the merits of the student's expulsion.

IDEA's stay-put provision was not applicable where the student had transferred from one state to another and where no proceeding was pending in the state while the student resided there. School district did not violate student's constitutional right to travel when it refused to implement the student's out-of-state IEP before conducting its own evaluation because student was not being treated differently from other state residents seeking special education services from the state for the first time.

Michael C. v. Radnor Township School District, No. 99-1124 (3rd Cir. Jan. 14, 2000)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=3rd&navby=case&no=991124

When a special education student moved with his father from one state to another, the father requested that the local school district implement the student's IEP from his previous out-of-state school. The school district responded with several educational proposals that the father rejected. He then unilaterally placed the student in a private school. After the student's family again moved to another state, the father initiated an administrative proceeding seeking reimbursement for the private school tuition. After exhausting his administrative remedies, the father filed suit in district court. In addition to the claim for tuition reimbursement, he alleged that the school district's actions had violated IDEA and his family's Fourteenth Amendment right to interstate travel. The district court granted the school district's motion for summary judgment on all the claims.

In a unanimous panel decision, the Third Circuit affirmed. Addressing the issue of whether the "then-current educational placement" language in IDEA's stay-put provision applies to students relocating from one state to another, the panel first noted that the language of the statute was ambiguous. It, therefore, looked to OSEP's interpretive rules for guidance. The panel found OSEP Policy Memorandum 96-5 clarified the stay-put provision by stating that it does not apply to situations where a student moves from one state to another. It concluded that this interpretation of the provision supported the overall view of IDEA that education is traditionally a state rather than federal function. The panel then turned to the father's contention that the school district violated IDEA when it failed to comply with a more stringent state stay-put provision. While it conceded that when there is a more stringent state requirement, IDEA mandates that school districts comply with state requirement, the panel found that the state requirement in the present case was not applicable because it only contemplated transfers between school districts within the state. Likewise, the panel rejected the father's argument that the school district was required to honor the out-of-state IEP's placement because IDEA requires the agreement of both parties to any change in placement during the pendency of any judicial or administrative proceedings conducted pursuant to section 1415 of IDEA. It concluded that the pendency requirement was not applicable here because there was no proceedings pending during the time period the student resided in the state. Regarding the father's Fourteenth Amendment right to travel claim, the panel found that the school district's refusal to honor the out-of-state placement did not impede the right to travel because the student was being treated like any other student requesting special education services from the state for the first time. Specifically, all students requesting special education services for the first time are required to undergo an evaluation before any services are provided.

Special education student was not denied a free appropriate public education under IDEA even though school failed to provide all the services and modifications outlined in his IEP because the school followed the significant provisions of the IEP. Student also was not denied a free appropriate public education even though his percentile scores indicated that he was not making the same level of academic progress as his nondisabled peers because his test scores and grade levels in a variety of subjects demonstrated that he was receiving an educational benefit.

Houston Independent School District v. Caius R., 200 F.3d 341 (5th Cir. 2000)

School district developed IEP for student identified as learning disabled. When the parents objected to the school's implementation of the IEP, the school made several changes, including providing the student with a phonics program. However, when the student entered sixth grade, the school was unable to find a qualified instructor for the phonics program. The parents refused

to accept compensatory phonics services and also questioned the student's progress under the IEP. The parents then brought an administrative action. The hearing concluded that the school's failure to consistently implement the phonics program, IEP modifications, and speech therapy deprived the student of a free appropriate public education under IDEA. When the parties failed to negotiate a new IEP, the parents removed the student and unilaterally placed him in a private school at their own expense. The school appealed the administrative decision to the district court. The court granted the school's motion for summary judgment, finding the student had improved in most areas of study and therefore had received an educational benefit in accordance with IDEA's mandates. In addition, the court dismissed the parents' counterclaim for reimbursement of the private school tuition. The parents appealed to the Fifth Circuit, arguing that the school failed to provide a "free appropriate public education" as required by IDEA.

In a unanimous panel decision, the Fifth Circuit affirmed the district court. The panel began its analysis of the "free appropriate public education" requirement by quoting *Rowley* for the proposition that "an 'appropriate education' is provided when personalized educational services are provided." It rejected the parents' contention that IDEA requires schools to provide services sufficient to maximize each child's potential. Instead, the panel looked to the four-part test laid out in *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245 (5th Cir. 1997), to determine if the student's IEP satisfied the free appropriate public education requirements of IDEA. Concluding that the first two prongs of the test were not at issue, the panel focused on parts three and four. Addressing the part three requirement that educational services be provided in a "coordinated and collaborative manner by key stakeholders," it agreed with the district court's conclusion that the school had met this requirement even though it had failed to provide some services consistently, such as the phonics program. Relying on *Gillette v. Fairland Board of Education*, 725 F. Supp. 343 (S.D. Ohio 1989), it pointed out that even though a school has failed to provide all the services and modifications outlined in an IEP, it can still provide a "free appropriate public education" if significant provisions of the IEP have been followed. Based on the record, it found that the school had followed significant provisions of the student's IEP, which resulted in the student receiving educational benefit. Regarding part four of the test, the panel rejected the parents' contention that the issue of whether there were demonstrable academic benefits should focus on the student's percentile scores as the best measure of academic performance. It, instead, agreed with the district court's focus on the student's test scores and grade levels in various subjects. The panel concluded, based on those indicators, that the school had demonstrated that the student was receiving an educational benefit from the IEP.

EMPLOYEE RIGHTS

High school administrator's freedom of association with principal and assistant principal was not violated when administrator was transferred because the purpose of the association did not involve matters of public concern. Administrator's liberty interest was not violated, even though statements made by school district officials at the time of her transfer stigmatized her reputation, because her transfer was neither a discharge nor a demotion to a position "far beneath" the one she previously held.

Klug v. Chicago School Reform Board of Trustees, 197 F.3d 853 (7th Cir. 1999)

http://www.kentlaw.edu/7circuit/1999/nov/98-3602.html

Elementary school teacher, holding a K-9 certificate, was named dean of incoming ninth graders at the high school. During her tenure at the high school, the dean was part of a faction, including the principal and assistant principal, in opposition to a group of teachers led by a community representative to the school council. The conflict centered on alleged misuse of funds from an internal student account by the community representative and teachers. Additionally, she alleged that her group was attempting to end the teachers' practice of failing to file lesson plans or complete other required reports. After conducting an investigation, the school district declared the high school in "educational crisis." The principal and assistant principal were removed from their positions, and she was reassigned as an elementary school teacher. The former dean filed suit under section 1983, alleging violations of her right to free association and her liberty interest. The district court dismissed the suit.

The Seventh Circuit in a unanimous decision with a concurring opinion affirmed. Because the case involved the issue of a public employee asserting her right to free speech, the panel applied the *Pickering* test. It found the former dean's allegations more akin to a dispute involving office politics than touching on matters of public interest. Specifically, it concluded that the dean's group was more devoted to settling petty office scores than it was to obtaining the goals of educational improvement and fiscal responsibility. It noted that even if it assumed that the dean had satisfied the public concern prong, she would have failed on the balancing prong because it was clear that the internal conflict between the two groups resulted in educational goals not being met. As the panel observed, the dean "and her group had lost control of the school." As a result, it found that the dean's assertion of her freedom of association undermined the school district's ability to provide educational services efficiently. Turning to the liberty interest claim, the panel conceded that public statements by school district officials stigmatized the dean's reputation. However, it concluded that the school district's action in transferring the dean was neither a discharge nor a demotion to a position "far beneath" the position she previously held. It rejected the dean's argument that loss in pay due to less hours worked was sufficient to establish a deprivation. The panel pointed out that the dean's rate of pay remained the same and that the number of hours required for teaching was simply fewer. The panel characterized the loss as equivalent to the loss of overtime pay.

African-American teacher's involuntary transfer and denial of request to be appointed to a physics teaching position constituted sufficient adverse job actions to state claim under title VII for racial discrimination based on disparate treatment. Teacher's involuntary transfers and denial of requested teaching assignment also supported a claim of constructive discharge under section 1981. However, teacher's allegations were insufficient to establish that the proffered legitimate nondiscriminatory reasons for the employment actions were pretextual where the school district's actions were based on a continuing

history of verbal and physical abuse of students and insubordination.

Jones v. School District of Philadelphia, 198 F.3d 403 (3rd Cir. 1999)

African-American high school science teacher who also coached the boys' varsity soccer team was transferred to another school after he received an unsatisfactory classroom evaluation and defied the principal's order to meet with a student's parent. At the next school the teacher requested the physics teaching assignment but the position was assigned to a white female. The African American teacher protested to no avail. After the teacher threatened to physically assault a student, the school district approved the principal's recommendation to transfer the teacher to a third school considered less desirable. After the teacher allegedly made ethnically derogatory remarks, he became involved in a physical altercation with a student who took offense to the remarks. The principal's investigation of the incident concluded that the teacher had made racist comments and that he struck the student without provocation. As a result, the principal recommended the teacher's dismissal. However, the teacher resigned before the school district took direct action to discharge him. After exhausting both his state and federal administrative remedies, the teacher filed suit claiming racial discrimination and retaliation under title VII and section 1981. He alleged that the involuntary transfers and denial of his teaching assignment request constituted disparate treatment and that the adverse employment actions taken against him constituted constructive discharge. The district court granted the school district's motion for summary judgment.

A Third Circuit panel affirmed. However, it found that the district court had erred in finding that the teacher had failed to state a *prima facie* case of racial discrimination under title VII. The panel held that an involuntary transfer to a less desirable school and the denial of the requested teaching assignment could constitute adverse employment actions sufficient to satisfy the third element of a *prima facie* case even if there was no loss of an employment benefit. Regarding the section 1981 claim, the panel held that the involuntary transfer to a less desirable position could support a claim of constructive discharge at the summary judgment stage. Having found that the teacher had established a *prima facie* case under both title VII and section 1981, the panel turned to the district court's pretext analysis. It agreed with the district court's conclusion that the teacher had failed to present evidence sufficient to overcome the school district's proffered legitimate nondiscriminatory reason for taking adverse employment action against the teacher. Specifically, the panel found that the school district's decision to transfer the teacher and the principal's eventual recommendation that the teacher be terminated were based on the teacher's long history of verbally abusing students and insubordinate behavior rather than any racial animus. In the final section of the opinion, the panel disposed of the teacher's retaliation claim, finding that there was no basis for it because the teacher had not filed his federal and state administrative complaints of discrimination until after he had been transferred.

TITLE IX

University's elimination of men's intercollegiate wrestling and soccer programs in order to reduce the disparity in participation in athletics between male and female students did not violate title IX because men's participation in athletics continued to be substantially proportionate to their enrollment. Title IX's permitting schools to eliminate men's athletic programs in order to achieve gender parity does not violate the equal protection clause because this limited consideration of sex serves the important governmental objective of eliminating sex-based discrimination.

Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999)

http://www.kentlaw.edu/7circuit/1999/99-1561.html

Female students made up 55% of university's enrollment but only 34% of the participation in intercollegiate sports program. In order to bring itself in to compliance with title IX's mandate that it "provide equal athletic opportunity" for men and women, the university considered three policy options promulgated by the Office for Civil Rights (OCR). It chose the option of providing substantially proportionate participation opportunities based on the men's and women's respective rates of enrollment. After considering ten methods of achieving "substantially proportionate participation," the university chose to drop men's soccer and wrestling programs and add women's soccer. Under this plan, the rate of participation would increase to approximately 52% for women and decrease to approximately 48% for men, narrowing the disparity in participation to about 4%. Members of the men's teams that were dropped filed suit against the university. Their main allegations included: (1) that the university's actions violated title IX; (2) that if title IX was interpreted to permit elimination of athletic programs based on gender, then it violated the equal protection clause. They also alleged a variety of violations of their constitutional rights under sections 1983 and 1985. The district court granted the university summary judgment on the title IX claim, and dismissed the section 1985 and 1983 constitutional claims on the ground they were preempted by the availability of the title IX claim.

The Seventh Circuit panel decision affirmed the district court on both the title IX and section 1985 and 1983 claims. The panel rejected the plaintiffs' argument that the decision to drop the men's program was based solely on gender and as such violated title IX on its face. Noting that the plaintiffs' contention was similar to that made by the plaintiffs in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), it found the plaintiffs' attempt to distinguish *Kelley* from the present case unpersuasive. Specifically, it found that the actions of both the defendant in *Kelley* and the university in the present case "were based on a combination of financial and sex-based concerns that are easily distinguished." Therefore, the panel held that *Kelley* was controlling and the district court properly granted summary judgment on the title IX claim. Turning to the equal protection issue, the panel again rejected the plaintiffs' argument on the ground that the issue was similarly raised in *Kelley* and rejected by the Seventh Circuit panel there. Repeating the holding in *Kelley*, the panel stated, "while the effect of Title IX and the relevant regulation and policy interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution."

RELIGION

Federal district court ruled that the Cleveland school voucher program violates the establishment clause of the First Amendment on the ground that the voucher program provides direct support not only to religious schools' secular educational programs but also to religious instruction.

Simmons-Harris v. Zelman, 72 F. Supp.2d 834 (N.D. Ohio 1999)

Following the Ohio Supreme Court's decision holding that the Cleveland voucher program violated the state constitution's single subject provision, the state legislature re-enacted it to comply with the court's ruling. Plaintiffs, parents and taxpayers, filed suit against the state in federal district court. Alleging that the voucher program violated the establishment clause of the First Amendment, they sought a preliminary injunction. The state countered that the plaintiffs were barred by the doctrine of *res judicata* from re-litigating the First Amendment issue because the Ohio Supreme Court had ruled on it. The plaintiffs responded that the Ohio Supreme Court's ruling on the issue was dicta because it was unnecessary to the court's decision. The district court held that the plaintiffs were not barred from litigating the establishment clause issue by the doctrine of *res judicata*. It found that although the plaintiffs had a full and fair opportunity to argue the First Amendment issue before the state supreme court, the issue was not essential to the Ohio Supreme Court's decision. The district court agreed with the plaintiffs that the Ohio Supreme Court's decision "could be fully supported by the state law ground—that the Legislature passed the law in violation of the one-subject bill." It also observed that the plaintiffs' argument was further strengthened by the fact that the plaintiffs were effectively barred from appealing the state court decision to the U.S. Supreme Court on the federal issue because the U.S. Supreme Court does not entertain appeals from final judgments that rest on federal and state grounds where the state ground is sufficient to uphold the judgment.

The district court then turned to the motion for a preliminary injunction. Focusing on the likelihood of success on the merits as the crucial factor in determining if the preliminary injunction should be issued, the court examined the voucher program in light of the *Lemon* test and the Supreme Court's decisions in *Nyquist*, *Mueller*, *Witters*, *Zobrest* and *Agostini*. The district court found that the issue in *Nyquist* was the same as in the present case, which the court framed as,"Does the program under review have the effect of advancing religion?" The district court like the Court in *Nyquist* concluded that the program had the effect of advancing religion because the voucher program provided unrestricted grants to parents in the form of scholarships to send their children to "nonpublic schools, the bulk of which is concededly sectarian in orientation." Based on the findings that 80% of participating schools were sectarian, 85% of students participating were attending sectarian schools, and no adjacent public school districts opted to participate in the program, the district court found in effect that religious schools were direct beneficiaries of the voucher program because there were no restrictions that the funds be used only for secular educational purposes. It rejected the state's contention that *Nyquist* had been overruled by the Supreme Court's subsequent rulings in *Mueller*, *Witters*, *Zobrest* and *Agostini*. It also rejected the state's argument that *Nyquist* had been undermined by subsequent cases. Instead, the district court distinguished the programs in *Mueller*, *Witters*, *Zobrest* and *Agostini* from the programs in *Nyquist* and the present case. The common factor it found in *Mueller*, *Witters*, *Zobrest* and *Agostini* was that the programs in those cases provided indirect, incidental benefits to religious schools because no public funds were placed in the schools' hands. Instead services were provided to students that they would have received, if they were attending public school. In regard to *Agostini*, the court pointed out that the program in that case merely allowed students attending religious schools as a result of parental choice to receive the same remedial services they would have at a public school. Based on its analysis of establishment clause case law, the district court granted the preliminary injunction on August 24, 1999. The state filed an appeal with the Sixth Circuit to dissolve the preliminary injunction. However, on August 27, 1999 the district court modified the injunction to allow students currently receiving vouchers to continue attending private schools. On October 28, 1999 Justice Stevens granted the State of Ohio's request that the U.S. Supreme Court intervene to decide whether newly accepted voucher students should be allowed to enter the program while the suit was pending. On November 15, 1999 the Sixth Circuit entered an order finding that the Supreme Court's decision rendered the state's appeal moot.

Having entertained motions from both the plaintiffs and defendants for summary judgment, the district court granted the plaintiffs' motion. However, with the consent of the plaintiffs, it stayed enforcement of the permanent injunction pending review by the Sixth Circuit. The court's analysis did not vary from the path it had already marked in its opinion granting the preliminary injunction. It found that while the voucher program satisfied the secular purpose prong of *Lemon*, it failed the primary effect prong. Comparing the voucher program with the tuition reimbursement program in *Nyquist*, the district court concluded that the majority of schools involved in Cleveland's voucher program (82%), like the program in *Nyquist* (85%), are sectarian and that like *Nyquist*, the voucher program makes "no endeavor to guarantee the separation between secular and religious educational functions and to ensure the State financial aid supports only the former." It rejected the defendants' argument that *Nyquist* had been overruled by the Supreme Court's subsequent line of establishment clause cases. It distinguished *Mueller*, *Witters*, *Zobrest*, *Agostini*, and *Rosenberger* from both *Nyquist* and Cleveland's voucher program, finding that the aid rendered in the former cases only incidentally benefited sectarian schools because the funds were provided for strictly secular educational services as opposed to direct cash pay outs via vouchers or tuition reimbursements to sectarian schools. The district court also dismissed the defendants' contention that the voucher program is just one of several forms of school choice programs available, such as magnet schools and community schools, which are predominantly nonsectarian in nature. It found that with 82% of the participating voucher schools being sectarian, the parents could not be said to be exercising any real choice in regard to choosing a sectarian school when they opt for the voucher program.

STUDENT RIGHTS

Student's free speech rights were not violated when he was disqualified from running in student council election after he distributed condoms in school in violation of school rule requiring students to obtain the principal's approval prior to distributing any materials on school premises. The student council election campaign was not an open forum, and the school's rule governing distribution of materials on school premises was reasonably related to a legitimate pedagogical concern.

Henerey v. City of St. Charles School District, 200 F.3d 1128 (8th Cir. 1999)

http://ls.wustl.edu/8th.cir/Opinions/991229/983439P.pdf

Student running for junior class president in high school's student council election signed a contract agreeing to obey all school rules. On the day of the election, the student handed out condoms in the school hallways. After the voting was completed, and the ballots were being tallied, another student complained about the student's distribution of condoms. When the principal learned of the complaint, he disqualified the student for violating the school rule requiring students to obtain the principal's approval prior to distributing any materials on school premises. The student filed suit under section 1983, alleging violation of his free speech rights. The district court granted the school district's motion for summary judgment. It held that: (1) the student election was a school-sponsored activity that took place in a nonpublic forum; and (2) the principal's decision to disqualify the student for failure to comply with a school rule was reasonably related to a legitimate pedagogical goal.

The Eighth Circuit in a two to one panel decision affirmed the district court. The majority began its opinion by noting that it was well settled that students' free speech claims must be analyzed "in light of the special characteristics of the school environment." It further observed that when student speech occurs in the context of school-sponsored activity that is not a public forum, the level of control schools exercise over the content of speech is greatest. Quoting *Hazelwood* the panel stated, "In the absence of a public forum, school officials may limit a student's speech in a school-sponsored activity if the limitation is 'reasonably related to legitimate pedagogical concerns.'" Before applying these principles, the panel first reviewed the record to determine if the student council election campaign was a public or nonpublic forum. Rejecting the student's contention that it was a forum for public expression, the panel concluded the election was conducted within the context of a nonpublic forum since the school intended to control the forum associated with the election. Specifically, it found that candidacy for office was limited to enrolled students, all candidates were required to sign a contract agreeing to obey school rules, and all campaign materials were subject to approval by the principal prior to being distributed. The panel next determined that the student's speech in the context of the election campaign was school-sponsored speech rather than independent student speech because the purpose of the election was pedagogical, *i.e.*, to allow candidates to develop leadership skills and to expose the general student body to the democratic process.

Having concluded that the student's speech was school-sponsored speech in a nonpublic forum, the panel turned to the principal's sole basis for disqualifying the student. It rejected the student's first contention that the rule was selectively enforced against him based on the content of his speech, *i.e.*, condoms, while allowing other student candidates to hand out candy. It pointed out that the record supported the school's assertion that handing out candy on election day was a long-standing practice tacitly approved by the school administration. Turning to the student's dual contentions that the rule was prior restraint on speech and unconstitutionally vague, it found that prior restraint of speech in a secondary school setting is not *per se* unconstitutional. Regarding the issue of vagueness, the panel observed that the very nature of the subject matter regulated by the rule required a high degree of generality. However, the rule promoted several legitimate interests, including maintaining discipline and order in the school and promoting respect for authority and traditional values. Finally, the panel found that even if the student's speech was protected and the principal's disqualification of the student was motivated by the content of his speech, there was no First Amendment violation. It observed that the distribution of condoms in the school environment could be construed as approval or encouragement of teenage sexual activity. The panel concluded that the school district had a legitimate pedagogical concern in separating itself from controversial topics, such as teenage sex. As a result, it held that the school district was acting well within its rights when it disqualified the student because his actions in distributing condoms were opposed to the district's pedagogical concerns and its educational mission.

The dissent argued that the principal's reason for disqualifying the student from the election was pretextual and that the real motivation was to censor the content of the student's safe sex message. The dissent contended that the rule failed to give the student adequate notice that his failure to comply with its prior approval requirement could result in his disqualification from the election. It also argued that because other candidates were tacitly permitted to distribute buttons and candy without express prior approval, the student's disqualification was based on his message rather than his failure to comply with the approval process.

What's New . . .in the Supreme Court

DECISIONS

98-405 & -406: ***Reno v. Bossier Parish School Board,*** 120 S. Ct. 866 (2000). After the Bossier Parish Police Jury redrew its electoral districts based on the most recent census demographics, the school board followed suit using the same redistricting plan. Although the U.S. Attorney General had granted the Police Jury's plan preclearance pursuant to the Voting Rights Act of 1965, when the NAACP challenged the school board's plan, the Attorney General denied preclearance. The school board then filed an action in district court, seeking judicial preclearance of the plan under section 5 of the Voting Rights Act of 1965. The Attorney General argued: (1) that the plan violated section 2 because it did not create as many majority-black districts as it should have; section 2 of the Act prohibits discriminatory voting practices; and (2) that the plan violated section 5 of the Act, even though it had no retrogressive effect, because it was enacted for a

discriminatory purpose. Rejecting both claims, the district court granted preclearance. As to the first claim, it ruled that it could not deny preclearance under section 5 based on a violation of section 2 because it would be allowing the Attorney General to do indirectly what it could not do directly, *i.e.,* use section 2 evidence to prove discriminatory purpose under section 5. Regarding the second claim, the court concluded that the school board had satisfied its burden that the plan was adopted for two legitimate nondiscriminatory purposes: (1) to assure prompt preclearance, based on acceptance of the Police Jury's identical plan; and (2) to enable easy implementation. After the Supreme Court granted *certiorari*, it vacated and remanded the case for further findings regarding the school board's purpose in adopting the plan. On remand, the district court again granted preclearance, concluding that there was no evidence to support a finding that went beyond the presence or absence of retrogressive intent. The Supreme Court again granted *certiorari* to decide whether the section 5 purpose inquiry extends beyond the search for retrogressive intent.

The Court affirmed the district court's grant of preclearance to the school board's plan. Delivering the Court's opinion, Justice Scalia rejected the Attorney General's and NAACP's argument that the purpose and effect prongs of section 5 have different meanings. Relying on *Beer v. United States*, 425 U.S. 130 (1976), he concluded that because the effect and purpose prongs are contained within the same sentence, in the context of a vote-dilution claim, they are both limited to the issue of whether there is a retrogressive intent. Justice Scalia found no support in section 5 case law for the proposition that the purpose prong has a more general discriminatory meaning. While he acknowledged that *Richmond v. United States*, 422 U.S. 358 (1975), might appear to give section 5 that broader meaning, the justice concluded that any discontinuity between the purpose and effect prongs was necessitated by the fact that the case was an annexation case requiring an exception to the retrogressive-effect principles in order to prevent all routine annexations from being ruled constitutionality invalid. He read the appellants' contentions as nothing more than a plea to overrule *Beer* without making that explicit argument. Justice Scalia stated that in light of *Beer,* the appellants' suggestion that section 5 extends to discriminatory but non-retrogressive vote-dilutive purposes lacks any support in the language of section 5.

Justice Thomas filed a concurring opinion while Justice Stevens, joined by Justice Ginsburg, filed a dissenting opinion. Justice Breyer also filed a separate dissent in which he agreed with Justice Souter's partial concurrence and dissent with the exception of that portion of Justice Souter's opinion that called for re-examination of *Beer.* Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer (in part), argued that the Court had erred in *Beer* when it limited the effect prong of section 5 to retrogression and that the Court in the present case was compounding the mistake by extending the same limitation to the purpose prong. He called for a reexamination of *Beer* to extend the inquiry under both the effect and purpose prongs to discriminatory intent.

98-791: ***Kimel v. Florida Board of Regents***, 120 S. Ct. 631 (2000). Petitioners were a group of current and former university employees that filed suit against the university when it failed to provide them a previously agreed upon market salary adjustment. They alleged that the university's action violated the ADEA and the comparable state statute. The district court denied the university's motion to dismiss, holding that Congress had expressed its intent to abrogate the states' immunity when it enacted the ADEA and that the ADEA was a proper exercise of its section 5 power under the Fourteenth Amendment. Several other cases involving the constitutional validity of abrogation by the ADEA were consolidated on appeal. In a divided panel opinion the Eleventh Circuit held that the language in the ADEA failed to evidence Congress's clear and unmistakable intent to abrogate the states' Eleventh Amendment immunity. Although the panel did not decide the issue of whether Congress had section 5 power to abrogate under the ADEA, it stated its belief that "good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment." The Supreme Court granted *certiorari* on both the issue of whether Congress manifested a clear unmistakable intent to abrogate the states' immunity when it enacted the ADEA and whether Congress had section 5 power to do so.

Although all the justices joined in affirming the Eleventh Circuit, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed an opinion concurring and dissenting in part; and Justice Thomas, joined by Justice Kennedy, filed an opinion concurring and dissenting in part. The Court's opinion was delivered by Justice O'Connor who held that although the ADEA contained a clear statement of Congress's intent to abrogate the states' immunity, the abrogation exceeded Congress's authority under section 5 of the Fourteenth Amendment. Justice O'Connor's opinion began with a restatement of the *Seminole Tribe* test: (1) whether Congress unequivocally expressed its intent to abrogate the states' immunity; and (2) if it did, whether Congress acted pursuant to a valid grant of constitutional authority.

Addressing the first prong of the test, she found that § 216(b) of the ADEA satisfies the intent requirement; it provides for suits by individuals against states by authorizing employees to maintain actions for back pay against any employer, including a public agency, in any federal or state court of competent jurisdiction. She rejected the respondents' arguments as attempts to create ambiguity in the language where there is none. Specifically, Justice O'Connor found nothing in the phrase "court of competent jurisdiction" that rendered Congress's intent ambiguous. In addition, she found nothing in the fact that the ADEA had its own enforcement provision that clouded Congress's intent as expressed in § 216(b).

Justice O'Connor then turned to the second prong of the test. She first noted that the Court had previously held that the ADEA was valid under Congress's commerce clause power without reaching the question of whether the ADEA could also be supported under Congress's section 5 power. Pointing out that *Seminole Tribe* established the principle that Congress lacks the power under the commerce clause to abrogate the states' immunity, Justice O'Connor stated that Congress's abrogation power rests solely within section 5. Citing the *City of Boerne*, she noted that Congress's legislative power under the Fourteenth Amendment was limited to enforcing those rights guaranteed by the Fourteenth Amendment rather than creating new rights. As a result, Justice O'Connor applied the "congruence and proportionality" test set out in *City of Boerne* to determine if the ADEA is "appropriate legislation" under section 5 of the Fourteenth Amendment. Noting that it was well established that age was not a suspect classification, she wrote that states are permitted to discriminate on the basis of age without violating the Fourteenth Amendment if the age

classification is rationally related to a legitimate state interest. Justice O'Connor concluded, given the lower constitutional standard that the state is required to meet in regard to age classifications, that the broad reach of the ADEA's protections resulted in prohibiting state actions that failed to rise to the level of constitutional violations. She further found that the ADEA's legislative record failed to establish that Congress had any credible evidence that state and local governments were unconstitutionally discriminating against their employees on the basis of age. As a result, Justice O'Connor held that the ADEA was not a valid exercise of Congress's power under section 5 of the Fourteenth Amendment.

Justice Stevens' opinion again raised the argument that the language of the Eleventh Amendment limits nothing more than the federal courts' diversity jurisdiction. He stated that he was unable to accept the precedent set in *Seminole Tribe* limiting Congress's authority to abrogate the states' immunity to those instances where there is a valid use of its section 5 power. However, he did agree with that portion of Justice O'Connor's opinion that found that Congress had demonstrated a clear and unmistakable intent to abrogate when it enacted the ADEA. Justice Thomas, on the other hand, disagreed with the majority on the issue of whether the ADEA satisfied the first prong of the *Seminole Tribe* test. In his opinion, the language contained in § 216(b) fell short of the clear statement required to evidence Congress's intent to abrogate.

98-1111: ***Texas v. Lesage***, 120 S. Ct. 467 (1999). In a per curiam decision the Supreme Court extended its ruling in *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274 (1977), beyond governmental decisions involving alleged retaliation for protected First Amendment activity. In this case a Caucasian applicant who failed to gain admission to a public university graduate program claimed that the school had violated his rights under the Equal Protection Clause because it considered race in its admissions review process. The university sought summary judgment based on evidence that the applicant would have been rejected even absent the consideration of race since the review committee considered many other applicants, including some who also were not admitted, to have better credentials. Although the university prevailed in the district court, the Fifth Circuit reversed, holding that an applicant who was rejected at a stage of the review process that was race conscious had suffered an implied injury. Since there was a factual dispute as to whether the stage at which this applicant was rejected was in some way race conscious, summary judgment was inappropriate.

The Supreme Court reversed, holding that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." In cases involving charges of racial discrimination where there is no allegation of an ongoing or imminent constitutional violation to support a claim for prospective relief, the government can avoid liability by proving that it would have made the same decision without the impermissible motive. In this case, the university had met that burden.

The Supreme Court did not address whether the applicant had abandoned his claim for injunctive relief on the ground that the university is continuing to operate a discriminatory admissions process. The Court also left the applicant's claims under section 1981 and Title VI of the 1964 Civil Rights Act for disposition on remand.

SUMMARY DISPOSITION

A-320: ***Zelman v. Simmons-Harris***, No. 99-1740 (N.D. Ohio Aug. 24, 1999). On Nov. 5, 1999 the Supreme Court granted by a 5-4 margin a request by the State of Ohio that new students be allowed to participate in Cleveland's voucher program while litigation surrounding its constitutionality continues. Ohio requested emergency action by the Supreme Court when the Sixth Circuit failed to respond to its request for review of a district court order prohibiting participation of new students.

ARGUED

98-1189: ***Board of Regents of University of Wisconsin System v. Southworth***, 151 F.3d 717 (7th Cir. 1998). Supreme Court heard oral arguments in case out of the Seventh Circuit which held that by allocating part of mandatory student activities fees to organizations that engage in political and ideological speech, state university violated the First Amendment rights of students who did not wish to subsidize those groups' activities. *Cert. granted*, March 29, 1999. Argued, Nov. 9, 1999.

98-1648: ***Mitchell v. Helms***, 151 F.3d 347 (5th Cir. 1999). Supreme Court heard oral arguments in review of a Fifth Circuit decision that ruled that a Louisiana school district's program under Chapter 2 of Title I of the 1965 Elementary and Secondary Education Act (now Title VI of the Improving America's Schools Act) through which it used federal funds to purchase computers, software and library books for sectarian schools violates the establishment clause of the First Amendment. *Cert. granted*, June 14, 1999. Argued, Dec. 1, 1999.

98-1828: ***Vermont Agency of Natural Resources v. United States***, 162 F.3d 195 (2d Cir. 1999). High Court will review decision of the Second Circuit that held that states are "persons" that can be sued under the *qui tam* provisions of the False Claims Act. Eleventh Amendment immunity does not apply in such actions brought by individuals because the real party in interest is the United States. *Cert. granted*, June 24, 1999. Argued, Nov. 29, 1999.

99-29: ***Brzonkala v. Morrison***, 169 F.3d 820 (4th Cir. 1999)(en banc). Supreme Court will review decision of the Fourth Circuit that held that Congress exceeded its authority under the commerce clause and the section 5 of the Fourteenth Amendment by creating private right of action for those who are subjected to violence motivated by gender under the Violence Against Women Act of 1994. *Cert. granted*, Sept. 28, 1999. Argued, Jan. 11, 2000.

REVIEW GRANTED

99-62: ***Santa Fe Independent School Dist. v. Doe***, 168 F.3d 806 (5th Cir. 1999). School district has asked Supreme Court to review Fifth Circuit determination that public school policy that permits high school students to choose whether to offer invocations and benedictions at football games without any restriction against sectarian and proselytizing prayers violates the establishment clause. *Cert. granted*, Nov. 15, 1999. Argument scheduled, Mar. 29, 2000.

99-423: ***Alsbrook v. Arkansas***, 184 F.3d 999 (8th Cir. 1999). The Supreme Court will determine whether the Americans with Disabilities Act (ADA) properly abrogates the sovereign immunity of states from suit in federal court. *Review granted*, Jan. 25, 2000.

99-536: ***Reeves v. Sanderson Plumbing Products, Inc.***, unpub. op. (5th Cir. April 22, 1999). Supreme Court will determine whether in an action brought under the Age Discrimination in Employment Act, a plaintiff must show direct evidence of discriminatory intent in order to avoid judgment as a matter of law for the employer. *Cert. granted*, Nov. 8, 1999. Argument scheduled, Mar. 21, 2000.

REVIEW DENIED

98-1747: ***Perez v. Pasadena Independent School Dist.***, 165 F.3d 368 (5th Cir. 1999). Supreme Court has let stand decision by the Fifth Circuit holding that Hispanic residents who brought an action under section 2 of the Voting Rights Act to challenge at large method for school board elections did not meet threshold showing that Hispanics were sufficiently large and geographically compact to constitute majority in any single member district. Evidence of elections in other similar districts and projected growth in Hispanic population was not sufficient. Showing must relate to *citizen* voting-age population, not voting-age population generally. *Review denied*, Jan. 18, 2000.

98-1987: ***Valdespino v. Alamo Heights Independent School District***, 168 F.3d 848 (5th Cir. 1999). Court left undisturbed Fifth Circuit decision that Hispanic voters had not satisfied *Gingles* requirement that minority group show that it is sufficiently large and geographically compact to constitute majority in a single-member district. Here plaintiffs had referred to a Hispanic majority that existed at the time 1990 census data were compiled, but the defendant school board had presented sufficient evidence to show that demographic changes had worn away that majority. *Review denied*, Jan. 18, 2000.

99-510: ***Indiana High School Athletic Assoc. v. Washington***, 181 F.3d 840 (7th Cir. 1999). Supreme Court denied high school athletic association's request for review of Seventh Circuit holding that determination of whether a person is a qualified individual with a disability protected under Title II of the Americans with Disabilities Act turns on an individualized inquiry as to whether waiver in the instant case of an eligibility rule for participation in a public program would conflict with the purposes of the rule to such a degree that it constituted a fundamental and unreasonable change. *Review denied*, Dec. 6, 1999.

99-527 & -574: ***Ryan v. Powell***, and ***Ridge v. Powell***, 189 F.3d 387 (3d Cir. 1999). Supreme Court will not hear arguments in Third Circuit case raising the issue of whether the U.S. Department of Education exceeded its authority under Title VI of the Civil Rights Act of 1964 by promulgating regulations that prohibit federal funds recipients from using criteria or administrative methods that have a disparate impact on racial minorities since Title VI prohibits only intentional discrimination. The Third Circuit had ruled that the regulations are valid and that there is an implied private right of action to enforce them. *Review denied*, Dec. 6, 1999.

99-625: ***Jewell v. Dallas Independent School Dist.***, unpub. op. (5th Cir. July 14, 1999). Supreme Court has denied public school teacher's request to review decision of the Fifth Circuit that she was provided adequate due process prior to her termination. The appellate court pointed out that she initiated grievances concerning two performance appraisals, she received a hearing, she was advised of the names of adverse witnesses prior to the hearing, she was represented by counsel and she had the opportunity to testify and cross examine witnesses. *Review denied*, Dec. 13, 1999.

99-628: ***Andrews v. Vermont Dep't of Education***, 738 A.2d 539 (Vt. 1999). Supreme Court will not review decision of the Vermont Supreme Court which held that local school district's policy which allowed tuition payments to be made to resident parents of children attending public or private secondary schools including sectarian schools violates the provision of the Vermont Constitution prohibiting the state from compelling any person from supporting any place of worship. Petitioners asserted that this ruling violates the free exercise and free speech clauses of the First Amendment. *Review denied*, Dec. 13, 1999.

99-693: ***Lichtig v. California***, unpub. op. (Cal. Ct. App. Mar. 1, 1999). Supreme Court denied student's request for review of California Court of Appeal's decision that found that his complaint brought in 1997 based on alleged mistreatment of him by faculty at a state school in 1982-83 is barred by the statute of limitations under the California Tort Claims Act. *Review denied*, Jan. 10, 2000.

99-713: ***Smith v. Board of Trustees for Okolona Municipal Separate School Dist.***, unpub. op. (5th Cir. July 26, 1999). Supreme Court will not hear challenge brought by high school principal to Fifth Circuit decision affirming the dismissal of his claim alleging that the school district had violated its own policies by not adhering exactly to its appraisal process. *Review denied*, Jan. 10, 2000.

99-816: ***Koenick v. Felton***, 190 F.3d 259 (4th Cir. 1999). Supreme Court has denied review of decision by the Fourth Circuit that upheld a Maryland statute requiring public schools to close on Good Friday. The appeals court said the law did not violate the establishment clause because it had a legitimate secular purpose because it sought to avoid disruption of instruction and the cost of hiring substitute teachers which would occur due to high absenteeism among students and teachers. The court also found no advancement of religion or excessive entanglement. *Review denied*, Jan. 18, 2000.

REVIEW REQUESTED

98-1658: ***Helms v. Picard***, 151 F.3d 347 (5th Cir. 1999). Review is sought in a Fifth Circuit case which approved against a First Amendment establishment clause challenge a public school system's provision of special education services to children voluntarily enrolled in parochial schools. The services were provided on site by public school teachers who were paid in part by a religiously affiliated corporation and were permanently assigned to teach for full school days at one sectarian school. Filed, April 13, 1999.

98-1671: ***Picard v. Helms***, 151 F.3d 347 (5th Cir. 1999). Louisiana Attorney General has asked the High Court to uphold the instructional material program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 as implemented by the Jefferson Parish School System and the state statute permitting the provision of school books and other instructional materials to all Louisiana school children, including those attending private sectarian schools. Filed, April 13, 1999.

99-596: ***George Mason University v. Litman***, 4th Cir. 1999. Virginia's state attorney general has requested High Court review of Fourth Circuit decision that Congress validly conditioned the receipt of federal funds on the state's waiver of sovereign immunity from suits in federal court for alleged violations of Title IX of the Education Amendments of 1972. Filed, Oct. 5, 1999.

continued on page 19

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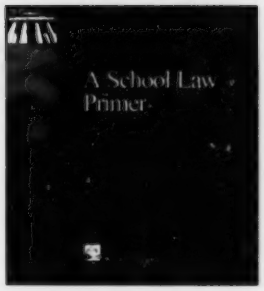

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99-812: ***Bridenbaugh v. O'Bannon,*** 185 F.3d 796 (7th Cir. 1999). Supreme Court has received request to determine whether the Seventh Circuit correctly held that an Indiana statute making Good Friday a state holiday is permissible under the First Amendment. Seventh Circuit found that the law had a valid secular purpose in affording a long spring weekend to its employees, many with spouses and children who would be off from school or work. Filed, Nov. 12, 1999.

99-901: ***Brentwood Academy v. Tennessee Secondary School Athletic Assoc.***, 180 F.3d 758 (6th Cir. 1999). Private school is seeking review of Sixth Circuit decision that voluntary secondary school athletic association is not a state actor. Appeals court reasoned that although the association is incorporated under state law, it receives no state funding but rather obtains most of its income from ticket receipts at various interscholastic athletic events. Since it is not a state actor, its sanction against a private school for an alleged rule violation cannot be deemed to violate the First Amendment. Filed, Nov. 29, 1999.

99-914: ***Kellenberg Memorial High School v. Section VIII of New York State Public High School Athletic Association, Inc.***, 255 A.D.2d 320, 679 N.Y.S.2d 660 (N.Y. App. Div. 1999). Nonpublic high school has asked the Supreme Court to hear its challenge to decision by New York state court that dismissed school's claim that athletic association violated its due process and equal protection rights by denying its application for admission. Filed, Nov. 30, 1999.

99-935: ***Chandler v. Siegelman,*** 180 F.3d 1254 (11th Cir. 1999). High Court review is sought in Eleventh Circuit case which held that prayer which is genuinely student initiated and non-proselytizing does not violate the establishment clause even when it occurs in public school classrooms and at school-sponsored activities. The Eleventh Circuit viewed such prayer as private speech entitled to protection under the free exercise of religion and the free speech clauses. As such it could not be prohibited nor be subjected to time, place and manner restrictions beyond those applicable to other forms of student speech. Filed, Dec. 2, 1999.

99-1031: ***Gomez v. Dade County School Board***, 181 F.3d 108 (11th Cir. 1999). Supreme Court has before it a request to consider Eleventh Circuit decision holding that evidence presented by plaintiff in retaliation claim brought under Title VII of the Civil Rights Act of 1964 failed to reach "threshold level of substantiality" required to state such a claim. Eleventh Circuit had also approved jury instruction that plaintiff had burden to persuade jury that legitimate, non-retaliatory reasons offered by the employer for its action were not true. Filed, Dec. 16, 1999.

99-1051: ***Benedict v. Eau Claire Public Schools,*** unpub. op. (7th Cir. Aug. 23, 1999). Teacher has filed petition for review of Seventh Circuit ruling that her claim of discrimination under the Age Discrimination in Employment Act and Americans with Disabilities Act was barred by claim preclusion principles. Filed, Dec. 20, 1999.

99-1069: ***Montgomery County, Md. Public Schools v. Eisenberg***, 197 F.3d 123 (4th Cir. 1999). School district has requested that Supreme Court accept review of decision by the Fourth Circuit that district's policy of using race as one factor in determining whether to deny school transfers violates the equal protection clause. The policy was adopted to maintain diverse student enrollments for educational reasons and to avoid racial isolation. Filed, Dec. 23, 1999.

99-1099: ***Lukan v. Scott***, 183 F.3d 342 (5th Cir. 1999). Employee of school district has asked High Court to review decision by the Fifth Circuit that superintendent did not violate employee's constitutional rights and was entitled to qualified immunity. The employee, an internal auditor for the district, had shown that the superintendent had removed certain responsibilities from the employee's control and had recommended that his contract not be renewed after the employee had reported financial improprieties to the state education agency and the district attorney. However, the employee failed to show that superintendent had blocked his hiring for position as chief financial officer or internal auditor based on the employee's whistle blowing activities. The hiring committee members had testified that they based their decision on candidate rankings. Filed, Dec. 27, 1999.

99-1205: ***Owsley v. San Antonio Independent School Dist.***, 187 F.3d 521 (5th Cir. 1999). Supreme Court review is sought of decision by Fifth Circuit that athletic trainers who work 60 hours a week are not entitled to overtime compensation under the Fair Labor Standards Act. The Fifth Circuit so ruled based on its determination that trainers are required to have a college degree, such that their additional short term study of anatomy, physiology and sports medicine does not preclude their inclusion under the "learned" prong of professionals exempt under the FLSA. The appeals court also held that trainers exercise sufficient discretion to meet the "discretion" prong of professional exemptions. Filed, Jan. 18, 2000.

99-1274: ***Arlington County School Board v. Tuttle,*** 195 F.3d 698 (4th Cir. 1999). Local Virginia school board has asked the Supreme Court to hear its challenge to Fourth Circuit determination that board's policy that uses race as one of several factors to weight lottery used to select students for admission to county wide traditional school violates the equal protection clause. The board had adopted the policy to ensure a diverse student body based on its determination that diversity provides certain educational benefits. The Fourth Circuit had invalidated the policy without development of a factual record. Filed, Jan. 31, 2000.

Chairman's Notes

NOMINATING COMMITTEE REPORT

In January 2000 the NSBA Council of School Attorneys' Nominating Committee* met by conference call to select a slate of candidates to serve as officers and directors for the 2000-2001 year. The committee members are the three immediate past chairmen of the Council and the Council chairman.

In accordance with the Council bylaws, the committee has "attempted to maintain a wide geographical representation on the Council Board of Directors to ensure that the professional interests and concerns of all members throughout the United States are

* Committee Chairman Ann L. Majestic (NC), Gary R. Thune (ND), Benjamin J. Ferrara (NY) and James T. Maatsch (MI)

represented." Officers serve for one year, and directors may serve for two 2-year terms. The following slate of nominees is recommended:

Officers

Chairman	Martin Semple (CO)
First Vice Chairman	Cynthia Lutz Kelly (KS)
Second Vice Chairman	Margaret A. Chidester (CA)
Secretary	Nancy Fredman Krent (IL)

Directors for Second 2-year term

David A. Farmelo (NY)
D. Patrick Lacy, Jr. (VA)
Rudy Moore, Jr. (AR)
Thomas W. Pickrell (AZ)
Stephen S. Russell (PA)

Directors for First 2-year term

Janet Little Horton (TX)
Ned N. Julian, Jr. (FL)
Jay Worona (NY)

Elections for officers and directors will be held at the annual meeting of the Council, 8:00 a.m., Saturday, April 1, 2000 at the Clarion Plaza Hotel, Orlando, FL. Nominations for each position may also be made from the floor during the annual meeting of the Council.

The committee would like to express its sincere appreciation to all individuals who submitted candidates for consideration. The Council will thank Melanie Gurley Keeney (MO) and Bruce W. Smith (ME) for their service to the board over the past four years during the annual meeting of the Council.

NEW MEMBERS

The Council would like to welcome the following new members:

Alaska
Michael L. Dishman
Bradley D. Owens
Andrena L. Stone

Arizona
Gregory Harris
Ben Jemsek

District of Columbia
Arthur Coleman

Florida
Felix M. Adams
Francisco Negron
Pam Saylor

Georgia
Judd T. Drake
William M. Fleming
Daniel R. Murphy

Idaho
John L. King

Illinois
Hector Lareau
Chris Miller
Terri L. Thomas

Virginia
G. Rodney Young, II

James T. Maatsch
Chairman

·NSBA·
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